

# The House of Lords is an effective safeguard against absolutism and improper legislation. The government should not force through reforms that would reduce the independence of its members

*Proponents of an elected House of Lords point to the current system and claim that there is a clear absence of democratic legitimacy. However, [Sir John Baker](#) argues that this obscures the real imperative which is to preserve an upper chamber whose members can act independently, without being beholden to party loyalties or partisan scruples. For the government to impose elections by forcing through an ill-thought out programme would be unworthy and ultimately detrimental to the body politic in the UK.*



## Appointment or election?

The future of the House of Lords is the most important constitutional question of the present age, because if it is resolved badly there may be little left of a British constitution at all. A constitution, whether written or unwritten, serves three fundamental purposes:

- It defines the way in which power is to be lawfully exercised by the Government of the day.
- It imposes limits on that power, so as to prevent absolutism and preserve basic values.
- And it provides some means of holding governments to account for the exercise of their power.

In the very recent past it has become a regrettable assumption by those in Government that they have been given an absolute power by the electorate during their term of office, including the power to change the constitution as a matter of routine, picking off one topic after another in no obvious order, without any joined-up thinking about the whole machinery.

The House of Lords has come to provide one of the strongest safeguards against absolutism and improper legislation. This must surely be a welcome – indeed essential – development, given the almost complete subservience of the Commons to the Government of the day. As Lord Simon of Glaisdale said as long ago as 1993, the House of Lords has become ‘effectively the only place in which the legislature can curb the power of the executive’.

The Lords have achieved what the ‘democratic’ Commons cannot chiefly because peers are less beholden to the party machinery and therefore more independent of Government. This advantage is generally recognised even by those who propose an elected House.

The principal objections to the present House of Lords are not to its independence of spirit but to its size, and to the system of selection by the Prime Minister. Although the majority of peers are well-chosen from persons of distinction in various walks of life, peerages are also honours, and they have been used by Prime Ministers to reward second-rate or even distinctly unsavoury politicians who, far from bringing special distinction to the upper House, have rather tended to bring it into disrepute.

It is fundamentally important to establish whether election, the course favoured by the Government, is a sensible solution to any real problem. It is by no means obvious that it is. The straightforward solution would be to remove ministers entirely from the selection process and transfer the power of selection exclusively to an appointments commission. The Prime Minister could continue to recommend names to the Queen, in accordance with the advice of the commission, but would not have the authority to do so without the sanction of the latter.

The appointments commission would, of course, become a very important body, but there is a precedent for that in the new system for selecting judges. It would have the advantage of becoming an expert body, expected to develop a detailed and systematic knowledge of the field of suitable persons for appointment, liaising with professional and other relevant bodies.

## Democratic legitimacy

Although almost everyone is agreed on the merits of the broadly constituted House of Lords that we have at

present, the leaders of the three principal political parties have decided that those advantages must be abandoned because an unelected House has no 'democratic legitimacy'. They therefore favour election, not so much as a solution to any perceived problem but as an end in itself. A possible explanation for this remarkable accord is that the concept of 'democratic legitimacy' is a self-serving doctrine calculated to ensure that in practice only full-time politicians would achieve membership of either House.

Even if that is too cynical an explanation, it can hardly be doubted that the result would be just that. Few candidates other than career politicians would be likely to stand for election for a position which would require electoral campaigning – a process in which the political parties would wield exactly the same kind of influence as they do in elections for the Commons – and would also require them, if successful, to give up their ordinary careers.

A very strong argument would be needed to justify moving to such a system. But no such argument has been made by those who propose it. Are we really forced to accept an admittedly undesirable result, which would in all probability destroy the usefulness of the second chamber, on the sole ground that it is the inexorable requirement of a vague theory of 'democratic legitimacy'?

It has not been explained by anyone why the House of Lords ought to be a 'democratic' body, in the sense of being elected. It cannot force legislation on the Commons but can only delay and improve. It does this most importantly in protecting the people against infringements of human rights and the rule of law; but it has also achieved a significant role in scrutinising and improving legislation, which is increasingly introduced with little care or thought by ministers hungry for headlines.

The alternative is to turn to the judges. But the increasing boldness of the courts in the wake of the Human Rights Act 1998 is a mixed blessing and not universally admired. Even the strongest advocates of judicial activism would have to admit that it is only needed where Parliament fails. It must be far more desirable for legislation to be put right before it is enacted than challenged in the courts afterwards. Most ordinary citizens do not have the means or the time to launch proceedings for judicial review, and in any case the available armoury is imprecise and can cause all the collateral damage of a blunderbuss.

For this reason alone, it is quite wrong to consider introducing an elected House of Lords without simultaneously addressing the question of a written constitution. The two should be inseparably connected, for a very simple but fundamental reason: if we are to have a constitution at all, it must be enforced either by checks within the parliamentary system or by checks from without.

It is sometimes suggested that the very existence of a body which may delay or even frustrate legislation proposed by a Government is somehow undemocratic. The Government propose to try to solve this problem legally by declaring that the House of Commons would continue to have the superiority accorded to it by the Parliament Acts. But that would contradict the theory behind the proposed change, and a legal declaration of something contrary to general perception would be fragile.

Indeed, if the 'democratic legitimacy' theory means anything other than enhancing the careers of party politicians, it is difficult to see why the [Parliament Acts](#) or the [Salisbury Convention](#) should have to remain in force if the Lords were to become an elected body. Regular conflict would be the full and logical price to pay for the sacred abstraction.

## **Conclusion**

The recent White Paper more or less assumes that the House should be elected. But this is too fundamental an issue to be treated so dismissively. For the Government to force such an issue would be unworthy. Constitutional reform should not be a matter of brute force, because the constitution does not belong to the Government but to the people. And the objective of parliamentary reform should not be an abstract concept of 'democratic legitimacy' which would in practice promote elective dictatorship. It should be the prevention, by the best available means, of the accrual of arbitrary, arrogant, and absolute power.